In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 2

ROBERT F. KENNEDY, Attorney General of the United States,
Appellant,

vs.

FRANCISCO MENDOZA-MARTINEZ,
Appellee.

On Appeal from the United States District Court for the Southern District of California, Northern Division

BRIEF FOR APPELLEE

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PRELIMINARY STATEMENT

This case, as the Court knows, is here for the third time. In the main we have made our arguments as well as we were able to make them. In view of the fact that the record in the prior hearing has been incorporated in the present one, it is respectfully hoped

that the Court will refer to our original brief in connection with issues other than those directly involved in the present remand.

It is our first duty, of course, to deal with the impact of the doctrine of collateral estoppel. This is the only non-constitutional issue and was the cause for the remand after it was raised by the Court *sua sponte*. But in considering the case on remand on this latest occasion the trial judge also dealt further with the problem of procedural due process of law. Thus (without reaching the utlimate question of whether denaturalization on this ground was within the power of Congress to impose) the trial judge further considered whether the statute was fatally defective by virtue of its failure to provide the basic safeguards to which a defendant in a criminal proceeding is entitled (R. 43-44.) The second portion of this brief will therefore be devoted to this subject.

Counsel for the Government have accurately and without coloration complied with the requirements of rule 40(1)(a) through (e). No supplementation is necessary.

SUMMARY OF ARGUMENT

In 1944, when Section 401(j) was enacted by Congress, appellee was residing in the Republic of Mexico. Since the statute imposes loss of citizenship *ipso facto*, without the necessity for any hearing, appellee necessarily lost his citizenship as of that date if the statute was applicable to him. And also as of that date appellee necessarily became a non-resident alien.

As such, after that date, he was no longer subject to Selective Service, since the only aliens so subject were those who resided in the United States. Accordingly, when the Government charged appellee with draft evasion and subsequently obtained his conviction therefor, not for the period 1942 to 1944 but for the period 1942 to 1946, it necessarily admitted that appellee had not lost his American citizenship.

The Government cannot escape this logic by urging that appellee's offense was a "continuing" one simply because appellee admittedly continued to be a fugitive as a result of his original offense. The commission of the offense must have stopped when Section 401(j) rendered appellee a non-resident alien. If it did not stop at that point, it is inescapable that the statute had no application to this appellee. Therefore the Government should not now be heard to assert that appellee had lost his citizenship when it caused him to be imprisoned, in part, on the basis of that same citizenship.

This is no mere hypertechnical exercise in logical deduction without contact with the realities of the case. On the contrary, it is a reasonable and proper inference that Judge Yankwich took into consideration the duration of the offense and that the period of four years, rather than two years, mitigated against Mendoza in the fixing of the sentence.

II

Section 401(j) is a penal, punitive measure. The history of this form of punishment and the history

of this particular statute require this conclusion—a conclusion already reached, for practical purposes, in *Trop v. Dulles,* 356 U.S. 86. As a penal statute, it does not even begin to comply with the requirements of due process which are operative in a criminal proceeding. The right to bring an action for declaratory relief under Section 503 of the Nationality Act cannot compensate for this deficiency, since it is no more than a civil action for declaratory relief in equity.

ARGUMENT

I

THE GOVERNMENT IS COLLATERALLY ESTOPPED NOW TO DENY THAT APPELLEE IS A CITIZEN OF THE UNITED STATES BY VIRTUE OF THE TERMS OF HIS PRIOR INDICTMENT AND CONVICTION FOR DRAFT EVASION.

To determine whether appellee's criminal conviction was premised in any manner upon his citizenship status, it is necessary that the indictment and judgment of conviction be studied. These were attached to the second amended complaint (amended pursuant to the terms of the remand) and now appear at R. 24 et seq. of the new record.

According to the indictment and the judgment, appellee departed the United States and went to Mexico for the purpose of draft evasion on or about November 15, 1942, and remained there until on or about November 1, 1946.

The classes of persons liable for military duty under Selective Service were defined at 50 U.S.C.A. 303(a), which read in part as follows:

> "Except as otherwise provided in this act every male citizen of the United States *and every other male person residing in the United States* who is between the ages of 18 and 45 at the time fixed for his registration, shall be liable for training in service in the land or naval forces of the United States." (Italics ours.)

It is to be seen that the duty of service was imposed on citizens and resident aliens but not on non-resident aliens.

Section 401(j) of the Nationality Act was enacted on September 27, 1944, about half-way through the period of draft evasion with which appellee was charged. According to 401(j), appellee became a non-resident alien as of that date.

But we have just seen that such non-resident aliens were not liable for military service. *Therefore when the Government charged appellee with draft evasion between September 27, 1944, and November 1946, and when the trial court subsequently found him guilty of draft evasion during the same period, it followed inexorably that appellee was thereby adjudged to be still a citizen of the United States. The judgment of conviction presupposed that appellee had not been denationalized under 401(j).*

We urge that the Government is estopped now to deny, by virtue of the foregoing, that appellee is a citizen of the United States or that he is entitled to the declaratory relief that he seeks.

Where a fact or determination is *necessarily comprehended* in a judgment, even though the judgment

does not explicitly contain it, the judgment is a bar under the doctrine of *res adjudicata* or collateral estoppel. (*Washington A & G Steam Packet Co. v. Sickles*, 5 Wall. 580; 18 Law. Ed. 550.) In the present case the trial Court in the criminal proceeding could not have found appellee guilty of draft evasion between September 27, 1944, and November 1, 1946, without concluding that he was a citizen of the United States.

Collateral estoppel may arise from a criminal proceeding to estop a party in a subsequent civil action. (*Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 95 Law. Ed. 534.) The estoppel may arise no less against the United States, in its capacity as plaintiff. (50 Corpus Juris Secundum 370.) And the estoppel is equally a bar to the Government if the law in the first action were erroneously applied to the facts, as long as there was a determination of a "fact, question or right": *United States v. Moser*, 266 U.S. 236, 60 Law. Ed. 262. The Court in *Moser* concluded: "A determination in respect to the status of an individual upon which his right to recover depends, is as conclusive as the decision upon any other matter."

It is no answer to say that appellee's offense from 1942 to the enactment of 401(j) in 1944 would alone have supported the penalty imposed on him. (Thus presumably invoking the rule in *Roviaro v. U. S.*, 353 U.S. 53, 1 Law. Ed. 2d 639.) It is not the imposition of the penalty as such which we are concerned with here; it is the legal impact of a substantive finding as

to appellee's citizenship status which is implicit in the judgment of conviction.

The foregoing point, however, draws attention to an aspect of the collateral estoppel now invoked which lends additional force to it. What appellee uses here is no mere hypertechnical exercise in logic. He relies on a determination by the original trial judge *on the basis of which he actually suffered punishment.* If the trial court had found that the extent of his offense was from 1942 to 1944, instead of 1942 to 1946, it seems an inevitable inference that the penalty imposed would have been mitigated accordingly. The trial court in its memorandum opinion asserts that there is nothing in the record to sustain this contention. We urge that the trial court erred in this regard because the inference is clearly there to be drawn. Any judge in any court seeking to do justice will consider, in meting out punishment, not only the *kind* of offense but the *extent* of it. It is one thing to evade the draft for a single day; it is quite another thing to evade it for a year. Correspondingly it is one thing to commit the offense for two years and it is another to commit it for four.

The government has sought to avoid this result by arguing that appellee was guilty of a "continuing" offense, so that he was in violation of the Selective Service Act from 1944 to 1946, but he continued to absent himself from the United States. But this is to confuse a *continuing offender* with one who, after the commission of the offense, continues to be a *fugitive*. If appellee lost his citizenship in 1944, at a time

when he was a non-resident of the United States, he became a non-resident alien and as such legally exempt from the requirement of military service. But having been punished as a citizen of the United States, appellee deserves to be treated as no less now that he has paid the penalty. The Government should not now be heard to deny the fact of his citizenship.

II

SECTION 401(j) FAILS TO MEET THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OF LAW.

In reconsidering this case after the present remand, the trial court wrote:

> "In addition to the views expressed in my memorandum and order of September 24, 1958, I construe Section 401(j), which provides for automatic divestiture of citizenship, as essentially penal in character, and deprives the plaintiff of procedural due process. In my view the requirements of procedural due process are not satisfied by the administrative hearing of the Immigration Service nor in this present proceedings."

We urge that it may well be that the view thus expressed by the trial court should be finally determinative here. It seems to us that it would be wholly consistent to adopt the view expressed by Mr. Justice Frankfurter, dissenting in *Trop v. Dulles*, that the "awesome power of this Court to invalidate . . . legislation . . . must be exercised with the utmost restraint", and yet at the same time scrutinize with

painstaking care the procedural manner in which the will of Congress is exercised. If it can be shown that the present statute is procedurally defective, there will be no need to reach the ultimate question of the extent of Congressional power in this area.

It is not difficult to get to the nub of the problem: The question is really whether Section 401(j) is in truth penal and punitive in nature. If it is found to be so, the absence of the procedural safeguards guaranteed in criminal proceedings is self-evident. Section 401(j) lacks even the protection of the right to trial by court-martial afforded by Section 401(g). Citizenship is taken away *ipso facto*, and there is no colorable basis for arguing that the civil remedy of declaratory relief which is the subject of the present action can redress the manifest original infringement upon due process.

When the form is pierced to find the substance, Section 401(j) emerges as plainly penal in nature rather than merely "regulative". We urge that the following factors cumulatively require this conclusion:

A. Ostracism, or banishment, was among the earliest of the primitive punishments devised by man. Its abandonment was a relatively recent development in the administration of justice, one usually regarded as a triumph of enlightenment over the traditions of barbarism.[1]

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[1]There is pertinent text material on this subject in "Punishment and Reformation" by Frederick Howard Wines, Chapter V "Intimidation and Torture", particularly at pages 85 and 86.

It is ironic to see designated as mere "regulation" in this day that which was among the harshest and least humane of punishments during the greater part of recorded history.

It is not sufficient to argue that aliens in this modern day are accorded many of this country's legal protections. The facts of the instant case are answer enough. Citizenship is first of all the right to be here, to remain here. If Mendoza is deported to Mexico according to the terms of the deportation order already outstanding against him, he will be cast adrift in the world as surely as were those in ancient times whose banishment was considered tantamount to death.

B. Moreover, Congress has historically labeled the loss of the rights of citizenship as a "penalty". The 1865 Act (13 Stat. 490) frankly so denominated it, and this Court so described it in *Kurtz v. Moffitt*, 115 U.S. 487, 501.

C. The legislative history of the present statute is also confirmatory. At 90 Congressional Record 7629, Senator Russell spoke as follows:

> "Information before the committee indicated that on one day several hundred persons departed from the United States through the city of El Paso, Tex., alone, in order to avoid service in either the Army or the Navy of the United States, and to avoid selection under the selective-service law. This bill provides that any person who is a national of the United States, or an American citizen, and who in time of national stress departed from the United States to another

country to avoid serving his country, shall be deprived of his nationality.

It further provides that any alien who is subject to military service under the terms of the Selective Service Act, and who left this country to avoid military service, shall thereafter be forever barred from admission to the United States.

Mr. President, I do not see how anyone could object to such a bill. An alien who remains in the country and refuses to serve in the armed forces in time of war is prosecuted under our laws, and if found guilty he is compelled to serve a term in the penitentiary. Under the terms of the Selective Service Act an American citizen who refuses to serve when he is called upon to do so is likewise subject to a prison term. Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, should be penalized in some measure. This bill would deprive such persons as are citizens of the United States of their citizenship, and, in the case of aliens, would forever bar them from admission into the United States. Any American citizen who is convicted of violating the Selective Service Act loses his citizenship. This bill would merely impose a similar penalty on those who are not subject to the jurisdiction of our courts, the penalty being the same as would result in the case of those who are subject to the jurisdiction of our courts."

Attention is also invited to the remarks of Representative Dickstein, Chairman of the House Immigration Committee, 90 Congressional Record 7725-26.

D. The actual source of this legislation is even more conclusive. It was not instigated at the request of the Secretary of War or Navy to implement the war powers, or at the request of the Secretary of State to implement the power to conduct foreign affairs. *It was instigated at the request of the Attorney General to punish certain draft delinquents who could not otherwise be reached.*

In this connection, it is impossible to improve upon the able discussion of the American Civil Liberties Union in their Amicus Curiae brief filed at the time of the prior hearing before this Court, and it is respectfully requested that this brief be restudied in its entirety. Most particularly attention is invited to the letter addressed by Attorney General Biddle to all United States Attorneys on the subject of the practical administration of Section 401(j) (Amicus Curiae Brief of American Civil Liberties Union, page 33).

E. Finally, we contend that this question is now behind us: The question of whether Section 401(j) is punitive and penal in nature was determined for practical purposes by this Court in *Trop v. Dulles*, 356 U.S. 86. Both Mr. Chief Justice Warren speaking for four members of the Court, and Mr. Justice Brennan concurring, were plainly and unequivocally of the view that Section 401(g), concerning the military deserter, is a penal and punitive measure. This being the settled judgment of this Court, it cannot sensibly be urged that Section 401(j), the Statute here being challenged, has any other status. To strike down the denationalization of a soldier fleeing

from duty as unconstitutional while upholding the imposition of the same sanction on a civilian fleeing the country to avoid military duty prior to his induction, on the ground that one is punitive while the other is merely regulative, would be to impose an indefensible distinction.

On the basis of the foregoing, it is submitted that Section 401(j) should be determined to be penal and punitive in nature, and as such, on its face, violative of procedural due process of law.

CONCLUSION

In addition to the grounds heretofore advanced to sustain our contention that the statute challenged here is inherently unconstitutional, we urge that on the foregoing more specialized grounds the judgment for appellee should be affirmed.

Dated, Bakersfield, California,
September 16, 1961.

Respectfully submitted,
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